

No. 15531

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

G. ABRAMSON and HOWARD MILLER,

Appellants,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate of
Feldman-Seljé Corporation, Bankrupt,

Appellee.

APPELLANTS' REPLY BRIEF.

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Because the jurisdictional basis, the statement of the case, and the questions involved on appeal have been fairly well settled by the opening and reply briefs, no further attention will be directed to these matters in this closing brief.

The appellants, however, do desire to make comment upon the reply brief filed herein and will do so under the points as numbered in the reply brief.

POINT I.

Since no cases are cited by the appellees under Point I, it is submitted that appellees have utterly failed to come to grips with the points raised as well as the authorities cited in the opening brief.

Evidently appellees are still under the impression that a judgment lien arose at the execution sale rather than

the transfer of title. No cases are cited in support of this view and it is submitted that such might be the case were an Abstract of Judgment recorded against *real* property but is surely not the case in view of the authorities cited in the previous memorandum.

POINT II.

To begin with it is true that the court found the value of the property to be in the sum of \$1,700.00 as is set forth in Appellee's brief. The fact that only \$500.00 was paid for the property involved does not render the consideration unfair. Mere inadequacy of the price paid for goods at execution sale, however, gross, is insufficient to render said sale invalid. There must be proof of either fraud, oppression or other unfairness in order to set said sale aside. (See *Bock v. Losekamp*, 179 Cal. 674, 179 Pac. 516 (1919), and *Rauer v. Hertwick*, 175 Cal. 278, 165 Pac. 946 (1917).)

The language of the Supreme Court in the case of *Jones v. Springer* cited in the opening brief, indicates that ordinarily the sales price of the goods is presumed to be the fair value at an execution sale.

Counsel goes on thereafter to cite various cases defining the rights of a bona fide purchaser, none of which were decided under the applicable provisions of Section 67 of the Bankruptcy Act. There is one notable exception and that is the case of *Dreyer v. Kicklighter* (erroneously cited as *Dreyer v. Klicklighter*). This case was, indeed, decided under Section 67 of the Bankruptcy Act.

Counsel has failed to note, however, that this case was decided under the *old Section 67(f)* of the Bankruptcy Act, the full text of which section is included in the body of the opinion. Sufficient to say that the Bankruptcy Act

has since been amended and that the new Section 67, which is under consideration here has eliminated the very language which was the subject matter of that decision.

If anything, the two sections, when placed side by side, indicate that law has progressed to the point where more and more protection has been given to purchasers at execution sale.

It should also be noted that the case of *Dreyer v. Kicklighter* has been overruled by implication in the Georgia courts in the case of *In re Moore*, 42 F. 2d 475, 16 A. B. R. (N. S.) 174 (D. C. Ga., 1930).

POINT III.

There is no comment on Point III, although it should be emphasized that personal property once sold at execution does find itself in the hands of subsequent purchasers and holders for value and thereafter may find itself in regular commercial channels in course of trade.

While the transferee of the purchaser may be in the same legal position as the purchaser at the sale strong policy reasons suggest themselves for conferring upon the purchaser good and valid title which may not be subsequently defeated by a petition in bankruptcy. These reasons are adequately covered in the opening brief.

POINT IV.

To the knowledge of appellees the question of the application of Section 3440 of the Civil Code of the State of California, has never been previously raised in these proceedings.

I do not think it is seriously contended that Section 3440 of the Civil Code was meant to apply or did apply to execution sales.

The statute itself contains a provision excluding its operation from judgment sales.

Section 3440.1(b)(a) provides as follows:

“Any sale, transfer, or assignment of a stock in trade or to any sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer, or retail or wholesale merchant, made under the direction or order of a court of competent jurisdiction or by any executor, administrator, guardian, receiver, or other officer or person acting in the regular and proper discharge of official duty or in the discharge of any trust imposed upon him by law.”

Respectfully submitted,

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